APPENDIX

Federal Statutes

From Revenue Act of 1934, c. 277, 48 Stat. 680; identical provisions with corresponding numbers in Revenue Act of 1936, c. 690, 49 Stat. 1648:

"Sec. 11. *Normal Tax on Individuals.*—There shall be levied, collected, and paid, for each taxable year upon the net income of every individual, a normal tax * * *."

"Sec. 12. *Rate of Surtax on Individuals.*—(b) There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual, the surtax shown in the following table: * * *."

"Sec. 22. *Gross Income.*—(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *."

"Sec. 181. *Partnership Not Taxable.*—Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

"Sec. 182. *Tax of Partners.*—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

From the above Revenue Act of 1934, Section 801 (a) (3), and Revenue Act of 1936, Section 1001 (a) (3) (Internal Revenue Code, Section 3797 (a)(2)):

"The term 'partnership' includes * * * a group, pool, joint venture, or other unincorporated organiza-

tion, through or by means of which any business, financial operation or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a member in such a * * * group, pool, joint venture, or organization."

GEORGIA STATUTES FROM CODE OF 1933:

"48-101. *Essentials of Gift.*—To constitute a valid gift, there shall be the intention to give by the donor, acceptance by the donee, and delivery of the article given or some act accepted by the law in lieu thereof."

"48-102. *Acceptance of Gift.*—If the donation shall be of substantial benefit, the law will presume the acceptance, unless the contrary shall be shown * * *."

"48-103. *Delivery.*—Actual manual delivery shall not be essential to the validity of the gift. Any act which shall indicate a renunciation of dominion by the donor, and the transfer of dominion to the donee, shall be a constructive delivery."

"53-404. * * * The husband * * * may at any time during the coverture, either through trustees or directly to his wife, convey any property to which he has title, subject to the rights of prior purchasers or creditors without notice."

"75-101. *Manner of Creating Partnership.*—A partnership may be created either by written or parol contract, or it may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal."

"75-206. *Interest of Each Partner; Liability for Losses.*—Unless otherwise provided in the agreement, partners shall be equally interested in all the stock or property brought into the business, it matters not by which; partners shall be equally entitled to share the profits and equally bound to pay the losses."

(Limited Partnerships) "75-401. *Formation: Nature of Business.*—A limited partnership, for the trans-

action of any mercantile, commercial, mechanical, manufacturing, mining, or agricultural business within this State, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this Chapter shall not be construed to authorize any such partnership for the purposes of banking or insurance."

"75-402. *How Constituted: General and Special Partners.*—Limited partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners, and of one or more persons who shall contribute in actual cash a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for debts of the partnership beyond the fund so contributed by him or them to the capital, except as hereinafter provided."

"75-403. *Authority of General Partners.*—The general partners only shall be authorized to transact business, and sign for the partnership, and to bind the same."

Sections 75-404 to 75-406 inclusive and 75-409 provide as to the nature of the certificate or agreement to be signed by the persons forming a limited partnership, acknowledgment thereon, filing for record, recording, and publication of terms of partnership for six weeks before the registry.

"75-417. *Liability of General Partners.*—The general partners shall be liable to each other, and to the special partners, for their management of the business of the firm, both in law and equity, as other partners are liable."

"108-114. *For Whom Trusts May Be Created.*—Trust estates may be created for the benefit of any minor * * *."

16

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 889

ESTATE OF R. A. SEWELL, JOSEPHINE M. SEWELL, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ADDENDUM TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Neither the *Tower* nor the *Lusthaus* decision determined the essential Questions or obviated the Reasons for Granting the Writ, as stated in the instant petition. (Cases cited in preceding Motion.)

(A) Gifts

Neither case involved questions as to the taxability of income from a corporate-stock alleged gift, or passed upon the validity of such a gift—effected (as in this case) by a constructive delivery, followed and completed (if further acts were necessary) by the donee's formal acceptance of the gift, indicated to the Government by her signed writing attached to the donor's gift tax return, and by her own pledges and sales of the subject-matter of the gift.

While the *Tower* case involved alleged invalidity, as incomplete, of the alleged gift of stock by husband to wife, because of the express *condition* attached that she place the corporate assets represented thereby in a proposed partnership—effected only 3 days after the transfer and practically contemporaneously therewith—the decision by the Court majority did "not find it necessary to decide this issue." (Slip Opinion, p. 7.) Nor did the *Lusthaus* case pass upon the effect of the money gift, from husband to wife, "which he had given her *conditioned* upon her turning it back to him" (Slip Opinion, p. 3. All emphasis herein ours); such alleged gift being part of the formation of the alleged partnership.

In both cases, all questions relating to the alleged gift were merely incidental to the one issue of Partnership or No Partnership, and the taxability of profits from such business.

In the instant case, there are two basic issues—Gift, and *more than 2 years thereafter,* Partnership. Some of the most vital questions relate to the validity (for income tax purposes) of such a Gift, and the taxability thereafter, to the husband or the wife, of dividends, interest, and profits accruing therefrom. Neither of the two decisions stated solved such questions, or resolved the conflicts, stated in the petition, between the present Court of Appeals' decision and those of other Courts of Appeals and other decisions: as to a Gift of the character involved, particularly where the Tax Court has found that no "shams" existed; where the uncontroverted evidence showed that the donor never at any time exercised any control over the subject-matter of the Gift (the stock); and where there was nothing whatever to support the Tax Court's finding and conclusion as to the invalidity of the Gift because of the absence of donative intent, unless it be the use by the hus-

band—more than 16 months after the transfer and subsequently—not of the stock, but of dividends, interest, and proceeds therefrom after the wife's own sales and pledges of the stock. Without arguing the merits, save only so far as is necessary for this petition—we insist that such a theory is manifestly erroneous and in conflict with the decisions stated in the petition, without precedent in Federal income tax, or general, law, and renders the situation one which the *Tower* opinion recognizes as a proper basis for appellate review, where "the Tax Court erroneously disregarded or improperly applied certain legal principles" (Slip Opinion, p. 5).

(B) Partnership

Both the *Tower* and the *Lusthaus* cases, where Gifts were made only to form family partnerships, and contemporaneously therewith, involved the question of sham, artifice, or fiction—the reality or unreality of the forms employed in creating an alleged, but not actually intended, partnership for the sole purpose of avoiding or reducing Federal surtaxes. This is manifest in both decisions. The Court so indicated in the *Tower* case by its use of these words and phrases: "sham," "no real partnership," "really and truly intended," "really exists," "real or pretended," "mere paper allocation of income," "no genuine union" (Slip Opinion, pp. 2, 5, 7-9); and in the *Lusthaus* case, by "supposed husband-wife partnership," "merely superficial," "outer garment of respectability," "not a genuine partner" (Slip Opinion, pp. 1-3).

In the instant case, the Tax Court found that there was no fraud, fraudulent pretense, or shams. As to *Partnership,* its decision (as affirmed by the Circuit Court of Appeals), while mentioning the wife's non-participation "in the management" or "actual running of the business," was not based on those factors, any more than it was based on

the principle of sham or fiction, or on a husband's continued control or economic ownership, such as invalidated the *Tower* and *Lusthaus* partnerships. The Tax Court (as it had previously recognized the validity of family partnerships based upon *gifts*, and had recognized the sufficiency of a capital contribution without management or active participation in a non-personal-service or non-technical-expert partnership) here recognized, by mention and citations, the same principle as to Gifts of Partnership Interests. But the Court failed to apply such principles, and held that it need not consider this or other factors as to the effect of the oral or written partnership agreements. This was because it misconstrued and misapplied what it considered the controlling rules of law, in holding that: "The Petitioner's position here * * * is not that the decedent made a gift of a capital interest in the hat business to his wife, but rather that she purchased such an interest with funds of her own. That position we have already held untenable" (Record, 68-71; Petition for Certiorari with Brief, pp. 29, 30; Questions 6-8; pp. 9-13).

In thus basing its ruling as to no Partnership on the alleged absence of any "*purchase*" by the wife of an interest therein, the Tax Court planted it on the previous erroneous ruling that there was no completed, valid *Gift*. That Court and the Court of Appeals thus ignored the undisputed facts: that such Gift of stock, in an independent, still-continuing corporate business, occurred more than 2 years before the creation of the alleged Partnership (the former in January, 1934, latter in February, 1936); that, so far as in any wise indicated, the formation of such a Partnership was not remotely in mind at the time of the previous Gift; that, not until 16 months after the Gift, did the husband (who was a stockholder and chairman of directors, with others, in the corporation) first use funds de-

rived from the stock Gift, in starting to build the plant of the hat business, which became part of the assets of the subsequent alleged Partnership; that, whether or not the wife's contribution to capital under the oral and written partnership agreements—by way of satisfaction or repayment to the wife for her funds used and to be used in the business—rested upon a *loan* to him (which the Commissioner contested), or rested upon his mere use of such monies either with or without her consent, the wife already had, under the law of Georgia (as shown in the Petition), an implied trust enforceable against the hat-business assets (an actual beneficial ownership given to her by law in such business), which afforded an ample and valid basis for her capital contribution under the partnership agreement, whether by "purchase" or otherwise.

Neither the *Tower* nor the *Lusthaus* case decided any such questions. If, here, the husband and wife in fact made no actual gift, no genuine partnership, under their continual sworn returns, written receipt for the stock gift, and acts through the years, they necessarily perpetrated upon both the Commissioner and the Reconstruction Finance Company (which took their mortgage as a partnership for a large amount), not only a barefaced sham, but a gigantic fraud. Yet the Tax Court found no fraud or shams.

Stripping its opinion of other facts in the companion cases, tried at the same time, but inapplicable to this Petitioner (probably confusing the Tax Court), the sole tangible basis for its rulings seems to have been the erroneous conception that mere use by a donor of proceeds from a Gift, lent or used with or without the donee's consent, more than 16 months after the Gift, without any previous attached condition, agreement, or understanding as to such use, is sufficient to negative donative intent, so as to nullify the Gift; and the conception that a mere relationship of husband

and wife, coupled with a desire to avoid and reduce Federal surtaxes (though there was no evidence as to any such expressed motive in this case), will defeat both a Gift and a Partnership for income tax purposes. Such latter conception is unsupported by either the majority or minority opinions in the *Tower* and *Lusthaus* cases.

Because of these errors of law, as to the novel and important questions involved, and the need for settling the conflicts stated in our petition, and because we believe that this Court should now differentiate between actual, bona fide gifts and partnerships (not involving technical trust agreements) where the dealings are realities—even though in a family group—and mere shams of fictions, and should now determine whether or not local law as to Gifts and Partnerships, or either, should be applied in such no-fraud, no-sham cases, we respectfully submit that this case is a meritorious one for the exercise of the Court's discretion in granting a certiorari.

Respectfully submitted,

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